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AUTHOR Julka, Michael J.
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ABSTRACT

This article presents an overview of the laws governing the use of computer software, along with an outline of precautions school districts should take to reduce the potential for liability. In 1964 the U.S. Copyright Office began to register software as a form of literary expression. This was followed by the Software Rental Amendments Act, which prohibited the commercial renting, leasing, or lending of software without the express written permission of the copyright holder. The exception to the law was educational institutions, which were allowed to transfer possession of lawfully made copies of computer programs. This did not mean that educational institutions had authority to illegally copy software. There are many types of software piracy, a common form being unlicensed copying, also known as softlifting, where an organization that has a limited number of licenses for a program makes extra copies to meet demand. Some of the consequences of pirating software include large fines, jail terms, and civil action. Enforcement of software copyrights includes litigation, raids, and audits. School districts can implement various measures to reduce incidents of software piracy by making employees aware of the lawful uses of software. (RJM)

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Michael J. Julien
Lathrop & Clark
Madison, Wisconsin

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Michael J. Julka
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Computer software is protected by U.S. and international copyright law. Illegal use of software, whether by mistake or through deliberate actions, is estimated to cost software publishers $2.8 billion a year in the U.S. and $15.2 billion a year worldwide. As a result, software publishers have increased their efforts to enforce their rights. Using illegally copied software constitutes theft and can have serious consequences, including fines for criminal offenses, large civil forfeitures, damage to business reputation, and payment of other parties' legal fees and costs. This article will provide an overview of the law governing the use of computer software and outline precautions school districts should take to reduce the potential for liability for illegal use.

SOFTWARE COPYRIGHTS

In 1964 the U.S. Copyright Office began to register software as a form of literary expression. The Computer Software Copyright Act of 1980 clarified that U.S. copyright law explicitly protects computer programs. 17 U.S.C. §§ 101, 106, 117. The law prohibits duplicating software for profit, making multiple copies for use by different users within an organization, and giving an unauthorized copy to another individual. 17 U.S.C. § 106.

In addition, in 1990 Congress passed the Software Rental Amendments Act (the Act) which prohibits the commercial renting, leasing, or lending of software without the express written permission of the copyright holder. 17 U.S.C. § 109. Pursuant to the Act, individuals may possess the original software program and one backup copy of the software for their own personal use. 17 U.S.C. § 117(2). No other copies may be made without specific authorization from the copyright owner. 17 U.S.C. §§ 109, 117.

It is interesting to note that the Act does, however, provide an exception for nonprofit educational institutions. The Act allows for the "*transfer of possession* of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, or students." 17 U.S.C. § 109(b)(1)(A). This exception does not, however, give educational institutions authority to illegally *copy* software.

In most cases, for software use to be lawful, it needs to be licensed. A software license sets out the rights and limitations for the use of the software. For example, a license may authorize that only one copy exist and require that the software be used on a certain specified computer. However, a license could also authorize 100 copies of the software to be made and the software to be used on 100 different computers. In general, software licenses may be customized to meet the particular needs of the consumer.

TYPES OF SOFTWARE PIRACY

There are a number of ways that software is illegally used (commonly referred to as "pirated") in violation of copyright laws by employees and other organizations.

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Many times it is simply inadvertent use of the software; but other times, it is a deliberate pirating of copyrighted material.

A common form of unlawful use of software is unlicensed copying, also known as softlifting. Softlifting usually occurs when an organization has licenses for a limited number of copies of the program, but as user requirements increase, illegal copies are made from the licensed programs to meet the demand. In addition, it is common for employees to copy software programs to take home and bring unlicensed programs from home and place them on work computers. Both of these actions are unlawful, unless agreed to in a software licensing agreement.

The pervasive use of the Internet has generated additional opportunities for obtaining software in an unlawful manner. It is very easy for programs to be downloaded from Internet websites or sent via e-mail to individuals who do not hold a software license. However, it needs to be noted that it is perfectly legal to download software that is designated as freeware,[1] public domain,[2] or shareware.[3]

Another form of software pirating occurs on computer networks when a software program is accessed by more users than a license permits. This often occurs as more computers are added to a network, or additional employees have a need to use a certain licensed product.

CONSEQUENCES OF PIRATING SOFTWARE

If caught with illegal software, an individual or organization may be criminally prosecuted. Criminal penalties for copyright infringement include fines up to $250,000 and jail terms of up to five years for the first offense, or both. 17 U.S.C. § 2319; 18 U.S.C. § 3571.

In addition, a civil action may be instituted by a software publisher for an injunction, actual damages (including lost profits) or statutory damages up to $100,000 per infringement, and costs and attorney's fees. 17 U.S.C. §§ 502-05.

ENFORCEMENT OF SOFTWARE COPYRIGHTS

Two national organizations pursue, and if necessary, bring suit against organizations suspected of pirating software. These organizations are called the Business Software Alliance and Software Publishers Association (hereinafter referred to as "enforcement organizations"). These enforcement organizations are funded by hundreds of software publishers of every size and type, including the largest software companies in the world.

The enforcement organizations use a number of weapons to compel compliance with the copyright laws, including litigation, raids, and audits. The first step used by the enforcement organizations to obtain copyright compliance is usually a cease-and-desist letter. This letter requests the entity under investigation to stop using illegal software and destroy all unlawful copies. Further, the letter will probably request that the target entity cooperate in a voluntary audit of its software. In most cases the entity may audit itself; however, in more serious cases, the enforcement organizations will insist on doing their own audit as an alternative to litigation. An audit will compare software found on computers and networks with purchase records and licensing agreements.

At the completion of the audit, the enforcement organization usually requires the target entity to destroy any illegal copies found and pay for them. In addition, the target entity must purchase any new copies it needs or desires. The end result is that an organization may pay nearly double for the software.

If the enforcement organization feels that litigation is required, it will often begin by seeking a temporary restraining order empowering their representatives, accompanied by U.S. Marshals, to raid the target entity by entering unannounced and conducting a surprise audit of the computer systems. It should be noted that simply deleting illegal programs from a hard drive will not prevent detection by computer technicians.

Both enforcement organizations have toll-free tip lines to report software piracy and have begun advertising the tip line in large metropolitan areas. One of the most common ways the organizations receive information is through disgruntled or fired employees who want to get back at their employers.

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freeware: Copyrighted software given away for free by the author. Although it is available for free, the author retains the copyright, which means that you cannot do anything with it that is not expressly allowed by the author. Usually, the author allows people to use the software, but not sell it.

public-domain software: Refers to any program that is not copyrighted. It is free and can be used without restrictions.

shareware: Copyrighted software distributed on the basis of an honor system. Most shareware is delivered free of charge, but the author usually requests that you pay a small fee if you like the program and use it regularly. By sending the small fee, you become registered with the producer so that you can receive service, assistance and updates. You can copy shareware and pass it along to others, but they too are expected to pay a fee if they use the product.

SOFTWARE MANAGEMENT AND PIRACY PREVENTION

A school district can implement a number of measures to reduce incidents of software piracy. The most important point to remember is that there must be enough software licenses for the actual number of users of each software product at any given time. Before additional licenses are acquired, an audit should be conducted to ascertain the current software usage and compare this to licenses which are currently held. A software audit may be accomplished with commercially available software, software put out by the enforcement organizations, or by contracting with an audit service provider. School districts should consider arranging for an audit of all computers and networks on a regular basis. Any illegal software discovered during the audit should be deleted.

Employees need to be made aware of the lawful uses of software. Many employees do not realize that software is copyrighted material and a license is required to use it. The education of employees can be accomplished by sending a memorandum to staff explaining the legal uses of software and necessity of licenses.

Further, school boards should consider establishing a written policy prohibiting employees from uploading or downloading copyrighted software over the Internet or bulletin board systems. In addition, having employees sign a software code of ethics, which sets out the rules and regulations of software use, may help solidify the importance of using software in a lawful manner.

School districts may also want to consider purchasing a network metering package which restricts the number of users according to the number of licenses. This technology may be helpful in ensuring compliance with software licensing agreements.

Finally, school districts should consider designating one individual to be the software manager. The function of the software manager is to channel software requirements and purchases and ensure that appropriate analysis is conducted. The software manager should also monitor software suppliers and software entering the district to keep a perpetual inventory.

The Software Publishers Association has a special portion of its website dedicated to helping schools come into and stay in compliance with software copyright laws. The website includes a "Sample Software Policy and Procedures" specifically directed at schools and a software code of ethics for employees and students. The web address is www.spa.org.

CONCLUSION

A district may believe that it does not have any illegal software, or, perhaps, has never given the issue much thought. A district may also believe that even if it does have illegal software, there is little chance of getting caught. This is not the case. The enforcement organizations have become more active recently. Moreover, it only takes one disgruntled employee to cause a great deal of anxiety and bad publicity, not to mention possible monetary losses. Consequently, school districts should consider implementing preventive measures to avert unlawful software usage. A well developed plan of software management will go a long way in helping eliminate the chances of having illegal software on computers and networks. This in turn will reduce exposure to lawsuits, criminal prosecution and unwanted publicity. In addition, having an adequate compliance program in place will provide a district with a sound bargaining position if contacted by either of the enforcement organizations.

Case Notes

School district's health services refusal to administer prescription drugs to student because of the district's written policy against administering prescription drugs in an amount exceeding the recommended daily dosage listed in the Physicians' Desk Reference (PDR) did not constitute discrimination based on a disability under section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act of 1990 (ADA).

DeBord v. Board of Education of the Ferguson-Florissan District, No. 96-4280 (8th Cir. October 8, 1997)

Student suffering from attention deficit hyperactivity disorder (ADHD) was prescribed Ritalin which was to be taken in two daily doses, one hundred milligrams taken at home prior to school and forty milligrams taken at 3:00 P.M. while still in school. The school district provides certain health services to students, including administering prescription drugs during school hours. Because the student's Ritalin dosage exceeded the PDR daily recommended dosage, health services refused to administer the prescription based the district's written policy. The student's parents filed